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KennedyCare Still Too Costly

Their Ship Sinking, Democrats Throw Patients Overboard To Save Trial Lawyers

In the wake of Congressional Budget Office (CBO) estimates that their "Patients' Bill of Rights" (S. 6) would cancel the coverage of some 1.2 million Americans, Senate Democrats are struggling to make their bill less costly.

To keep their bill afloat, Democrats jettisoned a 25-year old right that patients otherwise could use to enforce the "protections" in the Democrat bill. Without this right, patients would endure longer, costlier coverage disputes. However, eliminating this right would prove profitable for trial lawyers.

Also telling is that Democrats eliminated this well-established right in order to preserve expanded lawsuits against employers and health plans. Evidently, subjecting patients to longer, costlier coverage disputes is more palatable for Democrats than denying trial lawyers a cash cow.

A Quick Resolution Vs. Pain & Suffering

The Employee Retirement Income Security Act of 1974 (ERISA) provides two ways to resolve coverage disputes in court: court-ordered "injunctive relief" that compels the plan to provide the coverage, or money damages after the plan fails to provide the coverage. While money damages can compensate an injured patient, injunctive relief ensures the patient will get the care he needs, when he needs it. If patients band together in a class action, the court can impose injunctive relief on the entire plan, rather than on a case-by-case basis.

The Democrat bill would change ERISA to remove any limit on money damages a patient could claim after harmed by a coverage denial. This is particularly attractive to trial lawyers, who benefit from large pain and suffering awards. In trimming the cost of their bill, Democrats left this provision untouched.

Instead, Democrats eliminated class action suits seeking injunctive relief for patients who want to enforce the "protections" in the Democrats' "Bill of Rights." This change would have several effects:

- Each patient wanting injunctive relief would have to fight for himself in court — no class actions.
- More coverage disputes would end up in court, as the ban on class actions would prevent plan-wide injunctive relief.
- Fewer patients would be able to pursue injunctive relief due to the financial burden of legal representation.
- Because each plaintiff would need separate representation, employment opportunities for trial lawyers would increase.

Left intact, the right to seek injunctive relief by class action would enable comprehensive resolution of coverage disputes before patients can be harmed. Democrats jettisoned this right while preserving the more costly liability provision that, while favored by trial lawyers, can only help patients after they have been injured.

A "Trial Lawyers' Bill of Rights"

Injunctive relief in a class action is perhaps the strongest patient protection available under ERISA, yet Democrats threw it overboard because it doesn't enrich trial lawyers.

It is heartening that Democrats were embarrassed by the cost of their bill: a 6.1 percent premium increase (above inflation) and some 1.2 million additional uninsured Americans. And it is heartening that Democrats are finally trying to make their bill less costly. Now if they could only remember that "patients' rights" is about helping patients, not trial lawyers.

RPC staff contact: Michael F. Cannon, 4-2946